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SUPREME COURT U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

PAN AMERICAN MATCH INC., *Petitioner*

v.

SEARS, ROEBUCK AND CO., ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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June 9, 1972

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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PAN AMERICAN MATCH INC., *Petitioner*

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SEARS, ROEBUCK AND CO., ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Pan American Match Inc., a corporation organized under the laws of the Commonwealth of Puerto Rico, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on January 10, 1972, affirming a judgment of the United States District Court for the District of Puerto Rico entered on February 9, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals is as yet unreported, and is printed in Appendix A hereto, page 1a. The opinion of the District Court ordering dismissal of petitioner's complaint is unreported and is printed in Appendix B hereto, page 7a. The opinion in a related case in the Superior Court of Puerto Rico is printed in Appendix C hereto, p. 11a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit sought to be reviewed was entered on January 10, 1972. This Court (Mr. Justice Brennan) extended the time within which to file petition for writ of certiorari to and including June 9, 1972, by orders of March 30th and April 28, 1972. The jurisdiction of this Court is invoked under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

1. Whether the court below was justified in upholding the dismissal of petitioner's complaint on the ground of *res judicata,* by reason of the prior decision in a related case in the Superior Court of Puerto Rico; or whether the principle of *res judicata* should not be so applied as to deny equal protection of the laws by preventing petitioner from exercising a right of redemption in its property condemned by the Commonwealth of Puerto Rico, which right of redemption is expressly provided in the statutes of the Commonwealth and was admittedly not accorded to petitioner.

2. Whether a reversal by this Court of the judgment of the Court of Appeals, which was based solely on the ground of *res judicata,* would be futile because the complaint would ultimately have to be dismissed for

failure to join indispensable parties; or whether complete relief can be accorded among those already parties, and, if not, whether the District Court should declare the rights of the present parties pursuant to section 2201, United States Code.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Amendment XIV to the Constitution of the United States, section 1:

> "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 United States Code, sections 1331(a), 1332(a) (c) and (d), 2201 and 2202:

Title 28, § 1331. Federal question; amount in controversy; costs

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Title 28, § 1332. Diversity of citizenship; amount in controversy; costs

> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

* * *

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: * * * * *

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, * * *.

Title 28, § 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Title 28, § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

48 United States Code, Sec. 737. *Bill of rights and restrictions.*

No law shall be enacted in Puerto Rico which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws.

* * * * *

Laws of Puerto Rico: No. 441 of May 14, 1947, and No. 375 of May 14, 1949 (amending No. 441). These statutes have been codified in Laws of Puerto Rico Annotated (28 L.P.R.A., sections 11, 12, 13 and 14):

[No. 441]

[*Approved, May 14, 1947*]

AN ACT

To Make It Understood That, in Case of the Total or Partial Sale of Property Condemned by Any Government Agency for Reasons of Public Utility, Preference for the Acquisition of Same Shall be Given to the Owners From Whom They Were Taken by Condemnation, and for Other Purposes.

Be it enacted by the Legislature of Puerto Rico:

Section 1.—All natural or artificial persons against whom condemnation proceedings were prosecuted by The People of Puerto Rico or by any of the departments, agencies, or instrumentalities thereof, shall have the preferential right to reacquire possession of and title to said properties whenever The People of Puerto Rico or the department, agency, or instrumentality thereof which has the title to said property registered in its name, decides to alienate, in whole or in part the properties condemned.

Section 2.—Persons granted the preference established in the preceding section shall not be required to pay more than they received for said properties; *Provided,* That for such improvements as may have been made on same they shall pay only the amount which was spent for them or the reasonable market value of same if the latter should be less than the former.

Section 3.—In order that the preference established by this Act may be effective the persons with

a right thereto shall be given by the entity who condemned at least ninety (90) days advance notice of the intention to alienate said condemned properties.

Section 4.—In case the properties condemned had belonged to a number of co-owners, the preference shall be given to all jointly; *Provided,* That, in case any of said co-owners does not wish to, or cannot, take advantage of said preference, any or all of the others may do so with respect to all the property to be alienated.

Section 5.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 6.—This Act shall take effect ninety days after its approval.

Approved, May 14, 1947.

[No. 375]
[*Approved, May 14, 1949*]

AN ACT

To Amend Section 1 of Act No. 441, Approved May 14, 1947 and for Other Purposes.

Be it enacted by the Legislature of Puerto Rico:

"Section 1.—All natural or artificial persons against whom condemnation proceedings were prosecuted by The People of Puerto Rico or by any of the departments, agencies, or instrumentalities thereof, shall have the preferential right to reacquire possession of and title to said properties whenever The People of Puerto Rico or the department, agency, or instrumentality thereof which has the title to said property registered in its name, decides to alienate, in whole or in part, the properties condemned; excepting such cases in which any other department, agency or instrumentality of the Government of Puerto Rico, in-

cluding the Municipalities of Puerto Rico and the Government of the Capital of Puerto Rico, are interested in acquiring said property for purposes of public utility."

Section 2.—All laws or parts of laws in conflict herewith are hereby repealed.

Section 3.—This Act, being of an urgent and necessary character, shall take effect immediately after its approval.

Approved, May 14, 1949.

Federal Rules of Civil Procedure:

"Rule 19. Joinder of Persons Needed for Just Adjudication.

"(a) Persons To Be Joined If Feasible.

"A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

"(b) Determination By Court Whenever Joinder Not Feasible.

"If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

STATEMENT

Prior to 1958 petitioner owned a tract of land comprising about 10,000 square meters in San Juan, Puerto Rico, on which was located a building in which petitioner had operated a match factory. Its manufacturing operations were then temporarily suspended because of a fire and other circumstances, and a portion of the building was leased to respondent Sears Roebuck de Puerto Rico, Inc., a Delaware Corporation wholly owned by respondent Sears Roebuck & Company, a New York Corporation. In June, 1958, the Commonwealth of Puerto Rico condemned petitioner's property, ostensibly for the benefit of its agency the Puerto Rican Industrial Development Company (PRIDCO), and compensation as determined in the condemnation action was paid to petitioner. In August, 1959, PRIDCO sold the tract in question, together with other property, to the parent Sears corporation,

which in turn transferred it to its Puerto Rican subsidiary for the purpose of enlarging the Sears' store previously operated under lease from petitioner. No notice of its intention to sell was given to petitioner, despite the express requirement for such notice contained in No. 441 of the Laws of Puerto Rico, Section 3, page 5-6, supra (28 L.P.R.A., Section 13).

In 1964 petitioner filed a complaint in the Superior Court of Puerto Rico seeking to exercise a right of redemption accorded to owners of property condemned by the Commonwealth when such property has ceased to be "of public utility", 28 L.P.R.A., section 6. The theory of this action was that the condemnation of petitioner's property was not for the benefit of PRIDCO, as it had purported to be, but was actually done with the intention of turning the property over to Sears for what was allegedly a private purpose. In 1967 the Superior Court of Puerto Rico dismissed petitioner's complaint, holding that a large Sears' store would give employment to many Puerto Ricans and was, therefore, essentially a public purpose. The Superior Court also held that Sears could recover $10,000 attorneys' fees, along with costs; and a stipulation was thereupon entered into between petitioner and Sears whereby petitioner waived its right to appeal to the Supreme Court of the Commonwealth in consideration of Sears' agreement to waive its claim for attorneys' fees.

On April 3, 1970, petitioner filed a complaint (Appendix D, p. 22a) in the United States District Court for the District of Puerto Rico, naming as defendants both the parent and subsidiary Sears companies, but without joining the Commonwealth and PRIDCO, which had been parties to the prior action in the

Superior Court. Jurisdiction was based upon diversity of citizenship; the existence of a constitutional question (U.S.C. Sec. 1331); the declaratory judgment statute (U.S.C. Sec. 2201); and the civil rights statutes. As will appear from Appendix D, the theory of the complaint in the federal court is entirely different from the theory of the earlier complaint in the Superior Court of the Commonwealth. While petitioner again seeks to exercise a right of redemption in the condemned property, it is a different right, provided under a different statute, for a different purpose. The present action is based, not on the cessation of a public purpose for the taking, but rather on the fact that the sale of the property to Sears was in violation of the express provisions of Puerto Rican Law No. 441 of 1947 (page 5, supra) for a right of redemption in the prior owner of condemned property whenever the Commonwealth "decides to alienate in whole or in part the property condemned", and that

> "In order that the preference established by this Act may be effective the persons with a right thereto shall be given by the entity who condemned at least ninety days advance notice of the intention to alienate said condemned properties." P.R. Law No. 441, approved May 14, 1947, 28 L.P.R.A. section 13.

Such ninety-day notice was admittedly not given to petitioner and it did not know of the proposed sale of its property.

Thus the ground on which petitioner seeks in the federal courts to effectuate its right of redemption is a wholly different ground than that relied upon in the earlier action in the Commonwealth court. The

difference between these two grounds has been recognized by the Supreme Court of Puerto Rico. In *Commonwealth of Puerto Rico* v. *Superior Court,* 86 P.R.R. 656, 658 (1962) the Court said:

> "This preference may be claimed when the properties condemned cease to be of public utility, Act No. 185 of May 5, 1949 (28 L.P.R.A. Sec. 6), *or* when the Commonwealth or the agency which has the title to said property registered in its name decides to alienate, in whole or in part, the properties condemned, Act No. 441 of May 14, 1947, (28 L.P.R.A. Sec. 11). See *Housing Authority* v. *Colon* 73 P.R.R. 208 (1954). It is to be noted that *in the latter case* it is necessary to serve on the interested party a ninety (90) days prenotice of the intention to alienate the properties condemned." (Emphasis supplied.)

However, the court below, misled no doubt by the District Court, failed to recognize the difference between the two statutes. The District Court erroneously referred (Appendix B, p. 8a) in its opinion to 28 L.P.R.A. section 6 (which had been invoked in the earlier action in the Commonwealth court) rather than section 11, deriving from Law 441, p. 5, supra, on which the complaint was explicitly grounded (see complaint paragraph 6b, p. 24a).

On this misunderstanding the District Court on February 8, 1971 granted motions to dismiss and for summary judgment filed by the defendants, on the ground of *res judicata,* and also on the ground of failure to join indispensable parties, i.e., the Commonwealth and PRIDCO. The Court of Appeals for the First Circuit affirmed on January 10, 1972, solely on the ground of *res judicata.*

REASONS FOR GRANTING THE WRIT

1. The basic reason for granting the writ here is that petitioner has admittedly been denied the right to exercise a right of redemption in its condemned property which right is expressly provided by the Puerto Rican statutes (Laws of Puerto Rico No. 441, page 5, supra). Petitioner submits that such a denial presents a classic case of denial of due process and of equal protection of the laws under the Fourteenth Amendment, through Title 48, section 737, United States Code; see *South Porto Rico Sugar Co.* v. *Buscaglia,* 154 F.2d 96, 100 (1946).

2. The principles of *res judicata,* which is the sole ground for decision of the court below, should be construed as understood in Puerto Rico; and they should be construed strictly against those who would rely upon them to deny the application to petitioner of a statutory right. When so construed petitioner's complaint in the District Court states a different cause of action from that previously adjudicated by the Commonwealth court. The instant claim arises under a separate statute, which deals with a different subject than the statute involved in the earlier action. *Res judicata* is substantive, and the federal courts will look to the Puerto Rican law for its scope. The doctrine is delineated by the Puerto Rican Civil Code as follows:

> "In order that the presumption of the res judicata may be valid in another suit, it is necessary that, between the case decided by the sentence and that in which the same is invoked, there be the most perfect identity between the things, causes, and persons of the litigants, and their capacity as such." Civil Code of Puerto Rico, Article 1204, 31 L.P.R.A. sec. 3343.

Plainly there was no such "perfect identity" between the two causes of action here in question. The question

of lack of notice of the proposed sale was not presented to the Superior Court of Puerto Rico, although it could have been, and this is the ground relied upon by the court below. Petitioner submits that such reliance is misplaced, since even matters actually litigated are not foreclosed by the prior determination, where different causes of action are involved, "if injustice would result"; and this is true even "where both causes of action arose out of the same subject matter or transaction." A.L.I. Restatement of Judgments, section 70:

> "Where a question of law essential to the judgment is actually litigated and determined by a valid and final personal judgment, the determination is not conclusive between the parties in a subsequent action on a different cause of action, except where both causes of action arose out of the same subject matter or transaction; *and in any event it is not conclusive if injustice would result.*" (Emphasis supplied).

3. While the absence of indispensable parties was not relied upon by the Court below, it was the primary ground relied upon by the District Court; and we deal with it briefly in event of an argument that reversal of the judgment below would be futile since the District Court would ultimately dismiss the complaint anyway on that ground. The District Court states:

> "The statute clearly states that in the event that the expropriated land ceases 'to be of public utility' the previous owners 'shall have first choice' to re-acquire the property. The only statutory obligation is placed upon the designated public officials mentioned therein. It is therefore quite clear that the Commonwealth and PRIDCO are indispensable parties herein." Appendix B hereto, pp. 9-10a.

As this passage indicates, the District Court simply did not deal with the statute before it, but rather with the statute which had been before the Commonwealth Court. Nor did the Court discuss the possibility of a declaratory judgment, on which its jurisdiction was also invoked, see Appendix, page 22a.

In any event, the Court's conclusion was erroneous. The Commonwealth parties are not indispensable since complete relief can be accorded without them, see Rule 19(a), F.R.C.P., page 7, supra. This is because all that will be necessary to correct this situation is for the District Court to declare the existing rights of the present parties in petitioner's tract of land. The Court need only follow the explicit language of the statute in question, Law No. 441. Thus, it should find: (1) that petitioner has by the instant action effectively exercised its right of redemption (sec. 1); (2) that respondents are entitled to be paid the amount which petitioner received for said properties, plus the amount paid by respondents for any improvements made by them on this tract "or the reasonable market value of same if the latter should be less than the former" (sec. 2), less, presumably, the reasonable rental value of petitioner's tract during the period of respondents' occupancy.

CONCLUSION

This petition for a writ of certiorari should be granted. The action suggested above will correct a miscarriage of justice. It will do more: it will confirm the faith of the people of Puerto Rico in justice as administered for Puerto Rico by the courts of the United States.

Respectfully submitted,

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June 9, 1972

APPENDIX

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1152

PAN AMERICAN MATCH INC., *Plaintiff, Appellant,*

v.

SEARS, ROEBUCK AND CO., ET AL., *Defendants, Appellees.*

Appeal from the United States District Court for the District of Puerto Rico

Before COFFIN, *Circuit Judge,*
VAN OOSTERHOUT,* *Senior Circuit Judge,*
and STEPHENSON,* *Circuit Judge.*

Arturo Aponte Pares for appellant.

Ruben Rodriguez-Antongiorgi, with whom *Fiddler, Gonzalez & Rodriguez* was on brief, for appellees.

January 10, 1972

VAN OOSTERHOUT, *Senior Circuit Judge.*

This is an appeal by plaintiff Pan American Match Inc. from final judgment dismissing its complaint with prejudice. Plaintiff brought the present action against Sears, Roebuck and Co., (Sears), and Sears Roebuck de Puerto Rico, Inc., (Sears P.R.), asserting diversity jurisdiction under 28 U.S.C.A. § 1332, and jurisdiction under the Civil Rights Act,[1] seeking to recover title and possession of 10,058 square meters of real estate in San Juan, Puerto Rico, previously owned by it, and damages.

---

* Of the Eighth Circuit, sitting by designation.

[1] Plaintiff's contention that it has asserted a cause of action under the Civil Rights Act is frivolous. No substantial violation of federal constitutional rights is asserted.

The land here in controversy was condemned in 1958 by the Commonwealth of Puerto Rico for the benefit of the Puerto Rico Industrial Development Company (PRIDCO), a government instrumentality created by statute to promote industry and commerce. Just compensation as determined in the condemnation action was paid plaintiff. On August 26, 1959, PRIDCO sold such real estate together with some adjoining land to Sears, who later sold and conveyed the land to its wholly owned subsidiary Sears P.R. A first class Sears store was erected upon the premises.

Plaintiff in its complaint asserts the sale to Sears is a nullity because the sale to Sears was not for an authorized public purpose and PRIDCO failed to comply with the provisions of 28 L.P.R.A. §§ 6, 11, 12, 13 and 14, which in substance provide that when land condemned by the government has ceased to be of public utility, the persons from whom the land is taken shall be given a preferential right to reacquire the land and shall be given ninety days notice of intended sale. No notice of sale was given. Plaintiff filed a motion for summary judgment which was denied.

Defendants filed a motion to dismiss and a motion for summary judgment, asserting the action should be dismissed (1) for failure to state a cause of action; (2) for failure to join the Commonwealth and PRIDCO, who are asserted to be essential parties; and (3) upon the ground that the cause of action here asserted was fully and finally adjudicated against plaintiff in civil case No. E-65-187 before the Superior Court of Puerto Rico, entitled *Pan American Match Inc.* v. *Sears Roebuck de Puerto Rico, Sears Roebuck and Co., the Commonwealth of Puerto Rico and Industrial Development Company of Puerto Rico.* The federal trial court (Judge Cancio) sustained defendants' motion to dismiss and for summary judgment by order, memorandum opinion and judgment dated February 8, filed February 9, 1971, basing its decision on failure to state a cause of action and failure to join indispensable parties.

The Court also determined that the plaintiff's cause of action was fully adjudicated on the merits by the Commonwealth court and that such judgment became final, and under the doctrine of res judicata barred the present action. The action was dismissed with prejudice.

Plaintiffs motion for reconsideration and additional findings was denied by order dated March 19, filed March 23, 1971. The order for dismissal with prejudice was reaffirmed. Included in the Court's order is the following:

> "As set forth in this Court's memorandum opinion, the Court finds that no cause of action against defendants flows out of the statute relied upon by the plaintiff. Moreover, plaintiff's claim was litigated before the Commonwealth courts and plaintiff elected not to seek a writ of review in the Commonwealth Supreme Court. Under the circumstances, the Court reaffirms its prior ruling of dismissal with prejudice."

This timely appeal followed. Plaintiff urges the court erred in dismissing its complaint upon each of the grounds urged in the defendants' motions. We are convinced the dismissal on the ground of res judicata is fully supported by record. Dismissal upon such ground is dispositive of this appeal.

The record before the trial court and before us consists of the pleadings in the present case, detailed affidavits, the complaint and the comprehensive findings of fact, conclusions of law and judgment entry made by the Commonwealth court in case No. E-65-187 and an agreement that no appeal was taken from such judgment. We find no dispute exists between the parties with respect to material facts.

It is undisputed that the defense of res judicata is applied by Puerto Rican courts. We may accept for our present purpose the rule urged by the plaintiff in its brief, as

quoted from *Melendez* v. *Cividanes*, 63 P.R.R. 4, 11, which reads:

> "The plea of *res judicata* arises from the necessity of putting an end to litigation. Hence, in order to invoke that doctrine successfully, a substantial identity between the subject matter, the causes of action, the parties and the capacity in which they acted, as well as the fact that the former adjudication was on the merits, must be established."

The Commonwealth court judgment relied upon was on the merits and final and involved the same subject matter as the present action, to wit the validity of the title to the land condemned by PRIDCO and conveyed by it to Sears and by Sears to Sears P.R. for commercial purposes.

Plaintiff urges res judicata does not apply because: (1) The parties defendant in the present action are not the same as the parties in case No. E-65-187. (2) The causes of action in the two cases are not the same. Plaintiff concedes that it was plaintiff in each suit. It points out that the defendants in the prior suit were Sears P.R., The Commonwealth and PRIDCO, while only Sears and Sears P.R. are defendants in the present case.

Sears was named as a party in the Commonwealth case and is described as a party in the judgment entered. The postjudgment stipulation states that Sears was not served with process in the prior action and did not enter an appearance. The stipulation was made in connection with an agreement to waive attorneys' fees allowed in the prior action. The judgment was not modified with respect to leaving Sears as a party. In any event, Sears P.R., as above stated, is a wholly owned subsidiary of Sears to which Sears conveyed its interest in the land in controversy long prior to any of this litigation. These can be no question that Sears was aware of the Commonwealth action or that it participated in its defense. Under the undisputed facts before

us, Sears P.R. is sufficiently identified with its parent company to represent the legal rights of the parent. Sufficient privity is established. *See Van Brode Milling Co.* v. *Kellogg Co.*, D.C.Del., 113 F. Supp. 845; *Towle* v. *Boeing Airplane Co.*, 8 Cir., 364 F.2d 590, 593. The fact that the Commonwealth and PRIDCO are not named defendants is not significant as Sears P.R. prior to either of the actions had acquired all interest of the Commonwealth and PRIDCO in the real estate.

Additionally, plaintiff asserted there is no identity of the causes of action in that in the Commonwealth suit plaintiff sought to recover the land on the basis the condemnation was a nullity because it was fraudulent and for an unauthorized purpose, while in the present action plaintiff urges that Sears P.R. acquired no valid title because plaintiff was not notified that the land was not needed for a public purpose and that it was to be sold, nor was it afforded an opportunity to repurchase the condemned land, and that under such circumstances it is urged that the sale and transfers made by the Commonwealth and PRIDCO were void and a nullity. Thus the basic cause of action in each of the cases is that PRIDCO had no right to sell the land to Sears and that no valid title was acquired by Sears or Sears P.R. by reason of the conveyances made to them by PRIDCO.

While plaintiff in the prior action did not expressly raise the issue that it was entitled to notice of sale and opportunity to buy under the Puerto Rican statutes heretofore referred to, it did urge that under Puerto Rican law the sale of the land to Sears for commercial purposes was violative of Puerto Rican law. The sale to Sears occurred several years before the commencement of the Commonwealth action and the validity of the sale is an issue which could have been raised and should have been raised in the prior proceedings testing the validity of Sears' title to the land.

It is well settled that a litigant cannot split his cause of action and have two trials upon the same alleged breach of

duty. *Baltimore S.S. Co.* v. *Phillips,* 274 U.S. 316, 320; *Towle* v. *Boeing Airplane Co., supra; Engelhardt* v. *Bell & Howell Co.,* 8 Cir., 327 F.2d 30, 32.

The law of res judicata as it relates to claim preclusion is firmly established. In a subsequent action by the same parties, a judgment on the merits in a former action based upon the same cause of action precludes relief on the grounds of res judicata. The judgment is conclusive, not only as to matters which were decided, but also as to all matters which might have been decided. *Tait* v. *Western Md. Ry. Co.,* 289 U.S. 620, 623, 53 S.Ct. 706, 77 L.Ed. 1405; *Baltimore S.S. Co.* v. *Phillips,* 274 U.S. 316, 319, 47 S.Ct. 600, 71 L.Ed. 1069; *Cromwell* v. *County of Sac,* 94 U.S. 351, 352, 24 L.Ed. 195; *Towle* v. *Boeing Airplane Co., supra; Engelhardt* v. *Bell & Howell Co., supra.* Such principles are recognized by the Supreme Court of Puerto Rico.

In *Cruz* v. *Ortiz,* 82 P.R.R. 802, 811, the Court states:

> "Only a few days ago we stated in *Bolker* v. *Superior Court; Sosa, Int., ante,* p. 785 (1961), that demurrer of res-judicata is directed, among other things to avoid the perpetuation of judicial controversies. We should add that it also serves the purpose of avoiding continuous hardship to one party by successively filing various suits related to the same matter. This is especially convenient in jurisdictions such as ours where our courts are heavily burdened with judicial work because of the large number of suits."

We agree with the conclusion of the trial court that "the cause of action which the plaintiff now brings before this court is basically the same as that exercised before the Superior Court." The action was properly dismissed with prejudice on the ground of res judicata—claim preclusion.

The judgment is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 243-70

PAN AMERICAN MATCH INC., *Plaintiff*

v.

SEARS ROEBUCK AND CO.,
SEARS ROEBUCK DE PUERTO RICO, INC., *Defendants*

Order, Memorandum Opinion and Judgment

This case comes before the Court on defendants' motion to dismiss the complaint for alleged failure to join the Commonwealth of Puerto Rico and Puerto Rico Industrial Development Company ("PRIDCO") as indispensable parties to this action and for failure of the complaint to state facts upon which relief may be granted. Both plaintiff and defendants ("Sears") filed also motions for summary judgment, raising additional legal questions such as the defense of res judicata, but in view of the clear jurisdictional question raised by the motion to dismiss, the Court gave precedence to said motion. Oral argument was heard on said motion and the parties filed simultaneous briefs in support of their respective positions.

Having considered the arguments set forth, the allegations of the complaint, the documents on file in support of the motions for summary judgment, and otherwise fully advised, for the reasons which shall be stated, the Court concludes that the motion to dismiss must be granted and the complaint dismissed.

The uncontroverted facts upon which the complaint is grounded are, basically, as follows: On or about June 1958 the Commonwealth of Puerto Rico, for the benefit of PRIDCO, a governmental public corporation, expropriated from the plaintiff herein approximately 10,000 square

meters of land. PRIDCO later grouped said land with an additional adjoining tract and sold the grouped larger parcel of approximately 38,443 square meters to Sears. A store was later built by Sears on said land.

On or about October 1964, the plaintiff filed an action in the Superior Court of San Juan, Puerto Rico, against the Commonwealth of Puerto Rico, PRIDCO and Sears claiming an alleged right to re-acquire the expropriated tract of 10,000 square meters. The plaintiff claimed that PRIDCO had failed to give it the first choice to re-acquire the said tract of land as provided in Section 6 L.P.R.A. 28, which reads as follows:

> "*Disposal of lands which cease to be a public utility.*
>
> The Secretary of Public Works of Puerto Rico is hereby authorized and empowered to exchange, sell or lease, with the approval of the Governor upon recommendation of the Secretary of the Treasury and the Secretary of Justice, such lands of the Commonwealth of Puerto Rico which cease to be of public utility, provided in his judgment said transaction will benefit the public interest; Provided, That in the exchange, sale, or lease of such land the previous owners thereof or their successors in interest shall have first choice, and the owners of adjoining parcels, second choice.—May 5, 1949, No. 1832, p. 572, § 1; 1950 Reorg. Plan No. 12, § 3(1); Const. art. IX, § 4; July 24, 1952, No. 6, p. 10, eff. July 25, 1952)."

The said complaint was fully adjudicated in the Superior Court with judgment on the merits against Plaintiff. The plaintiff did not seek in the Supreme Court of Puerto Rico a writ of review and the judgment became firm and final.

The cause of action which the plaintiff now brings before this Court is basically the same as that exercised before the Superior Court, but in the present case the Commonwealth

of Puerto Rico and PRIDCO are not joined as party defendants. Jurisdiction is claimed on diversity grounds.

Defendants' motion to dismiss narrows to the issue whether the Commonwealth and PRIDCO are indispensable party defendants and whether the complaint states facts against Sears upon which relief may be granted.

It is clear that if the Commonwealth and PRIDCO are joined as defendants, diversity jurisdiction fails since the plaintiff is a Puerto Rican corporation. It is also clear, however, that if the Commonwealth and PRIDCO are indispensable parties, the Court may not proceed further and the complaint, not being susceptible of amendment, must be dismissed. Rule 19, of the F.R.C.P., as amended; *Shields* v. *Barrow,* 17 How. 130, 15 L.ed. 158 (1854); *State of Washington* v. *United States,* 87 Fed. 2nd 421, 427-428 (1936); *Jamison* v. *Memphis, Transit Management Company.* 381 Fed. 2nd 670 (1967); *Moore's Federal Practice,* Second Edition Vol. 3A, Ch. 19, page 2101 et seq.

In the determination of this question the Court must look to local or State law to determine the substantive rights upon which the plaintiff seeks relief. This is well said in the *Jamison case,* supra, as follows:

> "Where, as here, the substantive rights of the parties are founded on State law, it is essential that State law be examined in determining whether a party is 'indispensable', although the question of the joinder of parties is controlled by the Federal rule . . . ."

We turn therefore to an examination of the Puerto Rican statute invoked by the plaintiff, above cited. The complaint, it is plain, seeks a remedy in the nature of an alleged right of redemption based on said statute. But the statute, upon careful examination, cannot lend comfort to the plaintiff's position. The statute clearly states that in the event that the expropriated land ceases "to be of pub-

lic utility" the previous owners "shall have first choice" to re-acquire the property. The only statutory obligation is placed upon the designated public officials mentioned therein. It is therefore quite clear that the Commonwealth and PRIDCO are indispensable parties herein. Moreover, the Court finds and holds that said statute does not create a substantive cause of action against the present defendants. See and compare *Kuchnig* v. *California Company*, 350 Fed. 2nd 551 (1965).

For the reasons stated the complaint is not susceptible of amendment. It is therefore ordered that the complaint be, and it is hereby dismissed with prejudice and without award of costs.

San Juan, Puerto Rico, February 8, 1971.

(s) HIRAM R. CANCIO
Hiram R. Cancio
Chief U. S. District Judge

APPENDIX C

IN THE SUPERIOR COURT OF PUERTO RICO
EXPROPIATIONS PART

Civil No. E 65-187

NULLITY OF EXPROPRIATION PROCEEDINGS

PAN AMERICAN MATCH INC., *Plaintiff*

v.

SEARS ROEBUCK DE PUERTO RICO, INC.,
SEARS ROEBUCK & COMPANY,
THE COMMONWEALTH OF PUERTO RICO and
INDUSTRIAL DEVELOPMENT COMPANY OF PUERTO RICO,
Defendants

Findings of Fact, Conclusions of Law and Summary Judgment

The facts and factors we must consider in the decision of the controversy between the parties, as these arise from the allegations of the parties themselves and from the records of Case E-57-654, Commonwealth of Puerto Rico v. Pan American Match, Inc., filed in this Part in December 1957 in connection with defendant's request for summary judgment in the present case, are as follows:

FACTS

1— At the request of the Industrial Development Company, the Commonwealth of Puerto Rico, on December 30, 1957, filed an Expropriation Complaint for acquiring two parcels of land located in the Ward of Hato Rey of San Juan, P. R., the first parcel with a capacity of 9993.24 square meters, bounded on the North in 108.19 lineal meters, by Coll y Toste Avenue and in 46.83 meters by Munoz Rivera Avenue; the second parcel on its Eastern side being adjacent to the previous one, and having a capacity of

968.22 meters, bounded in 9.41 meters by Coll y Toste Avenue.

2— It was alleged in the said expropriation complaint that the proceeding was being instituted by the Commonwealth of Puerto Rico under Law No. 188 approved May 11, 1952 (sic),[1] as amended by Law No. 99 approved on April 18, 1952; Plan of Reorganization #10 of 1950, approved by the Legislature of Puerto Rico; Law #377 approved on March 8, 1951; and the General Expropriation Law, approved March 12, 1903, as subsequently amended.[2]

3— It was alleged in paragraph 2 of the said complaint that the Administrator of the Economic Development of Puerto Rico deemed it useful, necessary and convenient, in order to carry out the purposes of the Industrial Development Company of P. R., to acquire the above described properties and, more specifically, to devote the same to the purposes indicated in Exhibit A;[3] that said acquisition was of public necessity and utility, since it complied with the purposes of the Company to provide new sources of employment and wealth to the growing populatio of Puerto Rico, by means of its industrialization program.

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[1] The said Law No. 188, known as the "Law of the Development Company of Puerto Rico" was approved on May 11, 1942, not "1952".

[2] Plaintiff did not mention Law No. 456 of May 14, 1952, repealing Section 6(a) of Law 188 of 1942, nor Law No. 1 of February 23, 1954, amending Section 8 of the said Law 188.

[3] The exhibit referred to describes the parcels acquired and states the names of the defendants, as well as the various encumbrances of the said properties, and at the end it is stated that the same will be devoted to industrial purposes in accordance with the objectives of the Industrial Development Company, as established by Law.

4— There are located on the said two parcels acquired, the following structures, among others:

(a) A building 100 feet wide by 160 feet long, made totally of reinforced concrete, with an area of 16,000 square feet.

(b) A building 52 feet wide by 23 feet in depth with an area of 1196 square feet. Made of reinforced concrete and concrete blocks.

(c) A building to be used as a garage measuring 18 feet wide by 20 feet long, made of reinforced concrete and concrete blocks.

5— On or about the date on which these properties were acquired, the parcels of land having a total capacity of 10,961 square meters, and the three structures above described, were in the possession of Sears, Roebuck & Co. under a lease contract, which contract would not expire for another two years, that is until December 30, 1959. In its Complaint Pan American Match Co. alleges that Sears used the property "for its *commercial* purposes of a private nature."

6— By Deed No. 70 before Attorney David Pastor, executed on December 30, 1957, plaintiff herein sold to the Industrial Development Company the three structures described above for the sum of $76,113.35, on stipulation that only the three buildings above referred to would be located on the property, the Corporation[4] obliging itself to remove all other structures located on the property, at its own expense. Further it was agreed that the Corporation would continue to receive from Sears, Roebuck, Inc. the rentals derived both from the structures sold and from the expropriated land up to May 30, 1958.

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[4] We shall hereinafter refer to Pan American Match Co., Inc. as the "Corporation" and to the Industrial Development Company as the "Company".

7— It was also on December 31, 1957 that the Commonwealth of Puerto Rico, for the use and benefit of the Company, filed the expropriation suit against the Corporation in order to acquire the lands where the above-described structures were located.

8— On January 30, 1958, the Corporation, represented by Attorney Horacio Franceschi, withdrew the amount of $123,923.87, without prejudice of alleging, in due time, that the land acquired had a greater value. The sum of $30,000.00 was reserved pending a future order, but on the following day, January 31, after the complaint was amended to increase the estimate of the original valuation by $35,784.77, the Corporation requested the delivery of the $30,000.00 held, and we ordered that the Secretary deliver the said sum.

On February 27 of the same year, the Corporation requested in writing the delivery of the additional amount consigned—$35,784.77. We set a hearing for March 10, 1958 to hear the parties as to the merits of the said motion, in view of the fact that the lessee, Sears, Roebuck & Co., had opposed the delivery of the funds referred to until the value of its lease right had been adjudicated.

At the hearing the Company stated for the record that it would answer for any damage suffered by lessee as a result of the expropriation. In view of this, Sears, Roebuck & Co. withdrew its opposition, whereupon the Corporation accepted the complaint in all its parts, after stating its conformity to the compensation finally estimated by plaintiff, amounting to $189,908.64.

We upheld the complaint and ordered the Secretary to issue a check in favor of the Corporation, which check was delivered on the same day of the hearing.[5]

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[5] In connection with the three hearings held, see the transcripts which are included in the record.

On March 24 we entered judgment decreeing that the title in fee simple to the expropriated land was in the Commonwealth of Puerto Rico for the use and benefit of the Industrial Development Company of Puerto Rico, and that the just compensation to be paid by the Commonwealth to the defendant was the sum of $189,908.64.

9— No appeal was taken to the Supreme Court against this judgment, and the same became firm, final and binding on April 25, 1958.

10— By public deed executed on August 3, 1959, the Industrial Development Company of Puerto Rico sold to Sears, Roebuck & Co. the parcel of land the object of this suit, which in turn, on January 31, 1961, transferred the said property to Sears, Roebuck de Puerto Rico. It is on this parcel where Sears, Roebuck de Puerto Rico erected the buildings where the commercial enterprise generally known as "Sears" is established.

11— The present suit for Nullity of Expropriation Proceedings was filed on October 15, 1964, that is, 6 years, 5 months and 20 days after our judgment in the expropriation case became final. Five years, two months and twelve days elapsed between the date on which the Company made the sale to Sears on August 3, 1959 and the date on which the said complaint was filed.

CONCLUSION OF LAW

1— In the Expropriation Complaint the Commonwealth of Puerto Rico alleged that the parcel was being acquired in order to carry out the purposes of the Economic Development of Puerto Rico, and, more specifically, to devote the same to the purposes indicated in Exhibit "A";[6] that

[6] On page 3 of the said Exhibit it is stated that the public purposes to which the properties expropriated will be devoted is to use the same for industrial purposes in accordance with the objectives of the Industrial Development Company of Puerto Rico as established by Law.

the acquisition of the said land was of public necessity and utility since it complied with the purpose of the Industrial Development Company of Puerto Rico to provide new sources of wealth and employment to the growing population of Puerto Rico, by means of its industrialization program.

2— It is provided in Law No. 188 of May 11, 1942, known as "Law of the Development Company of Puerto Rico", that "in addition to other powers conferred upon it thereby, the Company is empowered to examine and investigate, conduct experiments and studies on, and to diffuse the resources of Puerto Rico and the possibilities and effective methods of promoting their adequate use by means of the establishment of industrial, mining, *commercial*[7] and cooperative enterprises, and through programs of educational training."

Article 10 of the said law authorizes and empowers the Company to "acquire in any legal manner . . . and own, conserve, use and exploit whatsoever real property it may consider necessary or convenient to carry out the purposes of the Company."

3— Law No. 99 of April 18, 1952, in its Statement of Motives, states as follows:

> "The Legislature of Puerto Rico . . . declares that (the industrialization program sponsored by the Government through the Industrial Development Company) is one of prime importance in the economic reconstruction of the Island, and that, therefore, it participates of the nature of a public utility and necessity."

Article First of said Law authorizes the Company to "acquire . . . including condemnation, any real property

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[7] Emphasis ours.

. . . for carrying out the purposes of the Industrial Company."

One of these purposes is to conduct, investigate and diffuse the possibilities and methods to utilize the resources of Puerto Rico, and thus create new sources of wealth and employment through, among other activities, commercial enterprises. (Art. 6(a) Law 188 of 1942).

The said Article 6(a) was inadvertently repealed by Law 99 of 1952, as per Section 5 thereof. But on February 1, 1954, by Act No. 1 approved by our Legislature, the powers and faculties conferred by said article were restored, and all acts and operations performed thereunder during the period elapsed from its repeal to the effective date of Law No. 105 of 1954, were approved and ratified.[8]

4— Law No. 29 approved June 11, 1964, created the "Commercial Development Company of Puerto Rico", the Legislature stating that it was its intention that the said company carry out its activities in a planned and efficient form for the joint development of the commercial sector, in such a way that it would benefit both the present and the future inhabitants of Puerto Rico through the maximum development of its human and commercial resources. (Art. 3). It is provided in Article 23 of this law that the provisions thereof shall prevail over the provisions of any other law of the Legislature which might be in conflict therewith.

It is our belief, and so we rule, that the Industrial Development Company was at that time and until the approval of this law, entitled to acquire by expropriation any property which its Administrator might consider useful, necessary and convenient to foster and implement commercial activities, whether on its own account or by stimulating private enterprise to promote, initiate and maintain the operation of said activity and commercial centers.

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[8] In Section 2 of said Law 105, the Legislature asserts and states that the said Article 6(a) of Law 188 of 1942 was "inadvertently" repealed.

5— Plaintiff's allegation in this case to the effect that the Company, in concert with co-defendant Sears, Roebuck & Company, expropriated the lands the object of this suit with the deliberate purpose of later selling the same to Sears, which would devote the same, as in fact it did, to absolutely private commercial purposes, and that, therefore, its allegation that the property would be devoted to public purposes was deceitful and fraudulent and made in order to induce plaintiff to settle the case for the sum indicated in the judgment rendered and not to raise the questions now brought up, since it was not aware of the fact that the property was to be used for commercial and not for industrial purposes, has no merits and should and cannot succeed.

The Commonwealth of Puerto Rico is authorized by Law, after having acquired a piece of property by expropriation for a specific public purpose, and once it has fee simple title to the same, to change the said specific purpose and devote the said property to some other public purpose which it deems more necessary, useful and convenient to carry out the ends and purposes of the law, thus protecting in a more efficient manner the public interest; or if it should deem that such change will be of greater benefit for the inhabitants of the community.

In the present case the Commonwealth, for the use and benefit of the Development Company expropriated the parcel the object of this suit on December 30, 1957, alleging that the public use to which it would be devoted would be for industrial development. It was not until August 26, 1959—one year, seven months and twenty-six days later—that the Company sold the property to Sears to devel- the commercial enterprise that all of us know.

The Company being authorized by law to make such determination, it committed no fraud in having expropriated under the allegation that the parcel was being acquired for industrial purposes, and nearly two years later devot-

ing said parcel to commercial purposes, since this latter activity was as legitimate as the first one.

6— If after becoming the owner of the acquired property, the expropriating agency should determine that the public purpose for which the property was taken has ceased to exist, or that it is no longer necessary to devote such property to such purpose, the said agency has a legal obligation to notify this fact to all the other agencies, instrumentalities and departments, as well as to the Government of the municipality where the property is located.

Should any of these entities need the property to devote the same to a public use, no matter that said use should be completely different from the one to which it was going to be devoted by the expropriating agency, the said property shall be transferred to the entity which may be interested in it.

The fact that the original purpose was altered does not make the transaction fraudulent, even though the person from whom the property was expropriated is not notified of such change.

If this is so, if the Development Company was authorized by law to transfer the parcel the object of this suit to another public agency should it determine that it did not need the property for industrial purposes, obviously the Company was authorized to use the property for one of the other purposes which it is authorized to sponsor and promote—in this case the establishment of a commercial enterprise, especially if it is borne in mind that the objective sought is the same as if the property had been devoted to industrial purposes, that is, the creation of new sources of wealth and employment for the public benefit of Puerto Rico. Fomento sold to Sears for the essential and sole consideration of the utility and benefit derived from the sale by our population. The benefit which Sears might obtain in its private commercial operations is purely

incidental to the public purpose intended by the law. (E.L.A. v. Fajardo Sugar Co., 79 DPR 321).

7—It is our view, and we so decide, that plaintiff has not established that the Development Company deceived this Court by using bad faith and fraud in order to obtain the judgment rendered by us on March 24, 1958.

The Law detests fraud and every presumption in the law is aimed against the existence of fraud. As a question of law we have already determined that the Company was authorized by law to take property through expropriation to devote the same to the establishment of commercial enterprises; and that it was also authorized to devote properties acquired through the means of expropriation to commercial activities, although at the time of the expropriation it was alleged that the property was taken for industrial purposes. We cannot conceive of any reasons or motives why the Company had to resort to pretense, fraud and deceit in order to acquire the land the object of this action, when the doors of the law were open to it to take the same legitimately and to devote the property to commercial purposes, provided, of course, that the acquisition and destination thereof had as a prime and essential objective the public use contemplated by the statute, specifically in this case the creation of greater wealth and more sources of employment for the benefit of our growing population.

8— It is declared that the Superior Court of Puerto Rico, Expropriations Part, has jurisdiction over the parties and over the subject matter in this case.

In view of the above findings of fact and conclusions of law, the Motion for Summary Judgment is granted and to such effect Summary Judgment is entered with the following pronouncements:

JUDGMENT

1— The Complaint filed by plaintiff Pan American Match Company, Inc. in this case, is dismissed as to all its parts.

2— Plaintiff is ordered to pay to defendants Sears, Roebuck de Puerto Rico, Inc. and Sears, Roebuck & Co. the costs and expenses of this litigation, plus an additional amount of $10,000.00 as attorneys' fees.

To Be Registered and Notified.

Given in San Juan, Puerto Rico, this 17 day of August 1967.

P. Santos Borges
Judge

Certified

to be a true and correct translation from its original

(s) Victor M. Melendez
Victor M. Melendez
Official Court Interpreter and Translator
United States District Court
for the district of Puerto Rico

I Certify:
Secretary.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 243-70

PAN AMERICAN MATCH INC., *Plaintiff*

v.

SEARS ROEBUCK AND CO.,
SEARS ROEBUCK DE PUERTO RICO, INC., *Defendants*

Complaint

Comes now plaintiff represented by undersigned attorney and before this Honorable Court respectfully alleges and prays:

Jurisdiction of This Court

This Honorable Court has jurisdiction under 48 USCA 863 and 28 USCA 1332 since plaintiffs (sic) is a corporation organized under the laws of the Commonwealth of Puerto Rico and co-defendant, Sears Roebuck and Company is a corporation organized under the laws of the State of New York, and having their central offices in that State; co-defendant, Sears Roebuck de Puerto Rico, Inc., is a corporation organized under the laws of the State of Delaware and having their central offices in that State. The amount in controversy exceeds $10,000.00 excluding costs and attorneys fees. This Honorable Court also has jurisdiction under 42 USCA 1981 et seq. (specially 1983) and under 28 USCA 1331, 1343 since plaintiffs was deprived of his property under color of law by co-defendants in violation of plaintiffs constitutional (sic) guaranteed property rights and in violation of due process of the law and the equal protection of law. This Honorable Court also has jurisdiction under 28 USCA 2201 and 2202, since plaintiffs herein is seeking a declaration of its rights and other legal relations between himself and defendants.

Common Facts to All Causes of Action

1. Plaintiffs was the owner in fee simple of a piece of land described in the Spanish [English] language as follows:

* * * * * * * * * *

2. The Above mentioned property was condemned by the Commonwealth of Puerto Rico, on June 19, 1958, and registered to his (sic) name at the Public Registry of San Juan, Section 2, Volume 647, Page 55, Estate No. 18.198; the price paid was approximately $190,000.00.

3. That the above mentioned property was grouped with others to form the following property described in the Spanish [English] language:

* * * * * * * * * *

4. From the above mentioned property an area of 38,443.55 square meters, or 9.8711 cuerdas, were segregated by Deed Number 30, on August 26, 1959, before Public Notary Julio Martínez Julia, and sold to co-defendant Sears Roebuck and Company, a Corporation organized under the laws of the State of New York, for the sum of $665,000.00, and was paid on the moment the sale was executed. The Spanish [English] description of the above property as follows:

* * * * * * * * * *

5. The above mentioned property, was sold to co-defendant Sears Roebuck de Puerto Rico, Inc., a foreign corporation organized under the laws of Delaware, by Deed Number 14, dated January 31, 1961, for the sum of $665,000.00, in which co-defendant Sears Roebuck and Company acquired a substantial amount of stock of Sears Roebuck de Puerto Rico, Inc. The above mentioned transaction was registered in the Public Registry, Section 2, Volume 698, Page 209, Estate Number 20,015.

6. That at the time both co-defendants acquired title to the above mentioned property they had full *knowledge* that

their title was null and void for the following reasons among others:

a. At the time the first deed of sale was executed and segregated, no aprobation of the Planning Board existed and therefore the Deed was null and void.

b. Plaintiff was never notified by the Commonwealth of Puerto Rico of their intention to sell the above mentioned property to co-defendants, nor co-defendants ever notified plaintiff of their intention to buy the above mentioned property.

c. The above mentioned condemnation procedure was executed null and void since the agency of the Commonwealth of Puerto Rico that brought the condemnation proceeding lacked the power in law to bring condemnations suits and/or the proceeding was brought in excess of its power.

7. Plaintiff desires to exercise its redemption right to the property that was illegally transferred to co-defendants under color of law and in violation of statutory law and plaintiffs' constitutional rights.

8. The property that belongs to plaintiff and co-defendants passes illegally has a market value in excess of $1,000,000.00, One Million Dollars, and if it had been rented during the years that have elapsed it would have rented in excess of $500,000.00.

9. Defendants lack title to plaintiff's property and are illegally and unlawfully in possession of plaintiff's property.

10. Plaintiff's original property of 10,628.50 square meters form part of defendant's lot of 38,448.55 square meters and can easily be physically identified.

First Cause of Action

1. Plaintiff reiterates all allegations in the Common Facts to All Causes of Action.

2. Defendant's actions have deprived illegally plaintiff of their property as described in Paragraph One of the allegations and has suffered damages in excess of $500,000.00 for the illegal retention of its property.

Second Cause of Action

1. Plaintiff reiterates all allegations in the Common Facts to All Causes of Action.

2. Defendants title to plaintiffs property, valued in excess of $1,000,000.00, is null and void and this Honorable Court should decree so.

WHEREFORE plaintiff respectfully prays that this Honorable Court grant the following remedies:

1. Order the Registrar of the Property, San Juan 2 to cancel all Inscriptions in his books regarding plaintiffs' property as described in Allegation No. 1 of the Complaint and that was grouped with others to form the tract of land described in Allegation No. 3, which was further segregated to form the tract of land described in Allegation No. 4 of the Complaint.

2. Order the Registrar of the Property, San Juan 2, that is, Section 2, to register in Plaintiff's name the tract of land described in Allegation No. 1.

3. Condemn both co-defendants to pay jointly the sum of $500,000.00 per damages suffered by plaintiff.

4. In the event that plaintiff's property cannot be registered in his name, condemn defendants to pay jointly the sum of $2,000,000.00, that is the market value of the above described property, plus damages.

5. Grant plaintiff any other and further relief that this Honorable Court may deem just and equitable.

In San Juan, Puerto Rico, this 1st day of April of the year 1970.

(s) ARTURO APONTE PARES
ARTURO APONTE PARES
P.O. Box 3133
Old San Juan Station
San Juan, Puerto Rico 00904

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

I.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 454 F.2d 871. The opinion of the United States District Court for the District of Puerto Rico is not reported.

II.

QUESTION PRESENTED

The question presented may be stated somewhat more simply than it is expressed by the Petitioner (Pan Am). It is:

> Did the court below determine correctly that Pan Am's action here was barred by the defense of *res judicata?*

This question involves no federal issue of substance and, accordingly, the Petition should be denied.

III.

STATEMENT OF THE CASE

In 1958, the Commonwealth of Puerto Rico condemned certain land owned by Pan Am for the benefit of the Puerto Rico Industrial Development Company (PRIDCO). Just compensation was paid to and accepted by Pan Am. In 1959, PRIDCO sold the land to Sears, Roebuck and Co. (Sears). In 1961, Sears sold the land to Sears, Roebuck de Puerto Rico, Inc. (Sears PR), its wholly-owned subsidiary, and a typical Sears store was erected on the land.

In 1964, long after the condemnation, Pan Am sued in the Superior Court of Puerto Rico to set aside the condemnation. Its complaint[1] covered a broad field. It joined the Commonwealth, PRIDCO, Sears and Sears PR as defendants. It asserted: (*a*) that the condemnation was void because not for a public purpose; (*b*) that PRIDCO had the duty to reconvey the property to Pan Am when it was not used for industrial purposes; (*c*) that Pan Am still owned the land; and (*d*) that Pan Am was entitled to rent since acquisition by PRIDCO. It sought a declaration that Pan Am owned the land and should recover such rental. The Superior Court, after three hearings,[2] denied all relief and dismissed the complaint.[3] Pan Am did not appeal.

Pan Am, undaunted by this decision, filed the present action in the District Court in 1970. Relying on diversity jurisdiction, Pan Am did not join the Commonwealth or PRIDCO as defendants; it joined only Sears and Sears PR. It asserted that the condemnation was void because it was never notified of the proposed sale to Sears and given an asserted right to repurchase the property.[4] It sought to recover title to the property and damages.[5]

The District Court held that the Commonwealth and PRIDCO were indispensable parties and that the complaint must be dismissed.[6] It held, in addition, that Pan Am had no cause of action against Sears or Sears PR but *only* against PRIDCO and the Commonwealth.[7] And on recon-

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[1] Appendix to Brief (1st Cir.) 38
[2] Petition 14a
[3] Petition 21a
[4] Petition 24a
[5] Petition 25a
[6] Petition 9a
[7] Petition 10a; see Appendix hereto

sideration, it held that Pan Am's action was barred by *res judicata.*[8]

The First Circuit affirmed, basing its decision on *res judicata.*[9] It noted that Pan Am's contention that it had asserted a cause of action under the Civil Rights Act was frivolous. It said:

> "No substantial violation of federal constitutional rights is asserted."[10]

IV.

ARGUMENT

A government has the right to condemn property for public use. *Jones* v. *Dravo Contracting Co.,* 302 U.S. 134 (1937); *Georgia* v. *Chattanooga,* 264 U.S. 472 (1924). A government's legislative determination of what is a public use will not be set aside unless manifestly arbitrary and unreasonable. *United States* v. *Tennessee Valley Authority,* 327 U.S. 546 (1946); *Old Dominion Land Co.* v. *United States,* 269 U.S. 49 (1925); *Block* v. *Hirsh,* 256 U.S. 135 (1921).

Condemnation requires notice, hearing and payment of just compensation. *United States* v. *Miller,* 317 U.S. 369 (1943). Pan Am does not allege that it did not receive due notice, that it was not accorded a proper hearing or that it was not paid just compensation. No citizen has a constitutional right to reacquire his property after it has been condemned by a government and he has received just compensation. Where such a constitutional right has been asserted, the existence of the right has been summarily rejected.

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[8] Appendix hereto

[9] Petition 6a

[10] Petition 1a

United States v. *Three Parcels of Land,* 224 F. Supp. 873 (D. Alas. 1963). Few states confer such a right in their condemnation statutes. This disposes of any due process argument.

No claim is made that Puerto Rico permitted some landowners to repurchase condemned property but denied that right to Pan Am. Thus no denial of the equal protection of the laws is in fact asserted.

The application of *res judicata* raises no substantial federal question when its application neither denies nor restricts a federally protected right. Because the right to repurchase is not a federally protected right, whether or not Pan Am had the right to repurchase is a matter solely of Puerto Rican law. Whether or not the right to repurchase had been previously adjudicated is, accordingly, only a matter of Puerto Rican law.

The decision below is not a departure from the accepted and usual course of judicial proceedings. Puerto Rico recognizes the doctrine of *res judicata* and applies it substantially in the same fashion that it would be applied in a common law jurisdiction. *Perez* v. *Bauza,* 83 P.R. 213 (1961); *Cruz* v. *Ortiz,* 82 P.R. 802 (1961); *Melendez* v. *Cividanes,* 63 P.R. 4 (1944). On this basis, not only did the court below follow the accepted and usual course, but its decision was right.

Furthermore, the decision below stands also on a valid alternative ground based purely on Puerto Rican law. That ground is the holding by the District Court that, if Pan Am has any cause of action, it is against Puerto Rico and PRIDCO and it has no cause of action against Sears or Sears PR.[11] That determination raises no federal question.

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[11] Petition 10a; Appendix hereto

No assertion is made in the Petition that the decision appealed from conflicts with that of another court of appeals or that it determined an important question of Puerto Rican law in conflict with any applicable Puerto Rican decision. This case raises no important question of federal law; in fact, as the Court of Appeals held, no substantial violation of federal constitutional rights was even asserted below. It is too late to assert such a violation in this Court.

V.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated July 6, 1972.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ORDER ON REHEARING

Civil No. 243-70

PAN AMERICAN MATCH INC.
PLAINTIFF

vs.

SEARS ROEBUCK AND CO.,
SEARS ROEBUCK DE PUERTO RICO, INC..
DEFENDANTS

ORDER

On February 8, 1971 this Court entered its "Order, Memorandum Opinion and Judgment" dismissing the complaint herein for the reasons that the Commonwealth of Puerto Rico and the Puerto Rico Industrial Development Company ("PRIDCO") are indispensable parties to this action and because the Puerto Rican statute upon which the complaint is grounded does not afford a cause of action against the defendants.

On February 17, 1971 plaintiff filed a "Motion for Reconsideration and/or Re-hearing" and a "Motion for Additional Findings of Fact and Amendments." The Court granted a hearing on these motions and the same were fully argued by counsel on March 5, 1971. Moreover, although plaintiff's motions have not raised any issues which had not previously been argued and briefed, the Court reexamined all relevant documents of record and the memoranda of law filed by both parties. After this thorough reexamination, the Court reaffirms the views expressed in its memorandum opinion of February 8, 1971, and for the reasons briefly stated herein, plaintiff's motions are denied.

In its motion for reconsideration, plaintiff requests that if the complaint be denied, such denial be granted without prejudice. As set forth in this Court's memorandum opinion, the Court finds that no cause of action against defendants flows out of the statute relied upon by the plaintiff. Moreover, plaintiff's claim was litigated before the Commonwealth courts and plaintiff elected not to seek a writ of review in the Commonwealth Supreme Court. Under the circumstances, the Court reaffirms its prior ruling of dismissal with prejudice.

Plaintiff seeks also additional findings of fact. A review of this Court's prior order shows that all facts relevant to this Court's decision are set forth therein. These facts appear uncontroverted. No other findings appear necessary.

For the foregoing reasons, plaintiff's motions of February 17, 1971 are denied and the order and judgment of February 8, 1971 dismissing the complaint with prejudice and without award of costs, is reaffirmed.

Let this Order be notified.

San Juan, Puerto Rico, March 19, 1971.

/s/ HIRAM R. CANCIO
HIRAM R. CANCIO
Chief Judge, U.S. District Court